PUBLIC PROSECUTOR

v.

QUAH SENG HOOI & ANOR

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL CASE NO: 45-1-1997]
5 AUGUST 1997

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in dangerous drugs - Possession - Proof of - Presumptions - Dangerous Drugs Act 1952, s. 37 - Burden and standard of proof*

Both the accused were charged with trafficking in a dangerous drug (heroin) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The court found that the accused were the only adult occupants of the house in which the incriminating evidence were found. From the undisputed evidence, the court found that there was drug trafficking activity in the back room of the said house. The sum total of the exhibits recovered from the said back room and the explanation of the chemist on the use of non-heroin material were direct evidence of trafficking within the meaning of s. 2 of the DDA. However, at the material time of the alleged commission of the offence, neither of the accused was in the immediate vicinity of the exhibits in the back room. The issue before the court was whether both the accused were in possession of the drugs at the time of the alleged commission of the offence.

Held:

[1] One may yet be in possession without physical possession. Physical proximity or actual physical possession, or the lack of it, cannot be considered in isolation, as the surrounding circumstances in as much as they may refute possession by one even in close proximity or in actual physical contact, may also affirm possession by one even from a distance. Judicial pronouncements on the meaning of possession include invariably some degree of custody or control, and knowledge of the custody or control. A person has no possession of that of the existence of which he is unaware. Mere knowledge is not sufficient to establish possession. However, the power of disposal is no longer an ingredient needed to support a conviction in a dangerous drugs trial.

[2] In proving the ingredients of an offence under the DDA, s. 37 thereof provides a number of presumptions. However, there **must** be the basic/primary facts or a pre-existent presumption for a particular presumption or further presumptions to materialise. This principle applies generally to all s. 37 presumptions. An accused will have to rebut a statutory presumption, whenever it is invoked upon proof of primary facts, on a balance of probabilities. However, even if an accused fails to rebut any presumption, but the court is still left in a state of doubt as to whether the accused has committed the offence, then the court will have to acquit the accused. In the instant case, the court found that both the accused were the only adult occupants of the house; thus, the presumption under s. 37(b) was invoked, ie, that both the accused were deemed to be the occupiers of the said house until the contrary was proved. However, there was no direct evidence to show that each of the accused had custody and/or control of the dangerous drugs and other exhibits in the back room.

[3] It was possible that when the 1st accused was away, the 2nd accused or a 3rd party could have entered the back room, as the rear of the house was not observed at all until after the arrival of the arrest party. It could not be inferred from the discovery of the drugs in the back room during the raid, that drugs were already in the back room when the 1st accused left the house. The drugs could have been deposited without the 1st accused's knowledge after he had left the house but before the arrival of the arrest party. The onus was not on the defence to prove the possibility of access by others but on the prosecution to exclude such a possibility. There was a total absence of direct evidence that could connect the 1st accused to the drugs in the back room. There was only his occupation of the house and his access to the back room, since he was an occupier of the house. Nothing more incriminating than a set of house keys was found on him. Drugs were not detected on his hands. The key to the back room, although the door was not locked, was not with him. His fingerprints were not found on any of the exhibits. The case against the 1st accused was built on suspicion, and suspicion alone, however grave, was neither cogent nor compelling evidence that the 1st accused had custody and control of the drugs to attract the presumption under s. 37(d).

[4] The instant trial concerned an offence involving capital punishment; thus, evidence by inference alone was not enough to support a conviction without the element of control. The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution's evidence. Irrespective of whether the court is convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.

[Both accused acquitted and discharged without their defence being called.]

Cases referred to:

Abdullah Zawawi Yusoff [1993] 4 CLJ 1 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(cit)***
Badrulsham Baharom [1988] 2 MLJ 585 ***(cit)***
Bahruni Ismail v. PP [1997] 3 CLJ 267 ***(foll)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(cit)***
Choo Chang Teik v. PP [1991] 3 CLJ 2387 ***(cit)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791 ***(refd)***
Director of Prosecutions v. Brooks [1974] AC 862 ***(cit)***
Gooi Loo Seng v. PP ***(cit)***
Ho Seng Seng v. Rex [1951] MLJ 225 ***(cit)***
Jayaraman v. PP [1982] 2 MLJ 306 ***(cit)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(cit)***
Lee Chee Meng v. PP [1992] 1 CLJ 345 ***(cit)***
Leow Nghee Lim v. Regina [1956] MLJ 28 ***(refd)***
Neo Koon Cheo v. Reg [1959] MLJ 47 ***(refd)***
PP v. Ang Boo Foo [1981] 1 MLJ 40 ***(cit)***
PP v. Bacho Samsudin [1994] 1 CLJ 143 ***(foll)***
PP v. Kau Joo Huat [1988] 2 MLJ 91 ***(cit)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086 ***(cit)***
PP v. Mohd Nasir Shahabuddin [1994] 2 MLJ 576 ***(cit)***
PP v. Tan Ah Ling [1990] 2 CLJ 83 ***(foll)***
R v. Abbott [1955] 2 All ER 899 ***(foll)***
R v. Ashwell [1885] 16 QBD 190 ***(refd)***
Sia Soon Suan v. PP [1966] 1 MLJ 116 ***(cit)***
Tai Chai Keh v. PP [1948-1949] MLJ Supp 105 ***(cit)***
Toh Ah Lok & Mak Tin v. Rex [1949] MLJ 54 ***(cit)***
Yuvaraj v. PP [1969] 2 MLJ 217 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180, 181, 182A
Dangerous Drugs Act 1952, ss. 2, 37, 39B(1)(a), 39B(2)
Penal Code, s. 34

For the prosecution - Salim Soib
For the 1st accused - Kitson Foong; M/s Kitson Foong & Assocs
For 2nd accused - S Asamaley; M/s Moi, Asamaley & Choong

JUDGMENT

Jeffrey Tan J:

Both accused are tried for the following capital offence:

> Bahawa kamu secara bersama-sama pada 23 November 1995, jam lebih kurang 6.05 petang, di rumah No. 1-T, Lorong Delima 9, Island Glades, di dalam Timur Laut, di dalam Negeri Pulau Pinang telah mengedar dadah berbahaya iaitu heroin seberat 1,720.1 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

With regard to the procedure for the trial, the Criminal Procedure Code, pursuant to the Criminal Procedure Code (Amendment) Act 1996, effective 31 January 1997, provides as follows.

Section 180

(i) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

(iii) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

Section 181

(i) When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence of the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence: Provided also that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(2) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if such witness is in attendance.

Section 182A

(i) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(ii) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon.

(iii) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

In particular, the present s. 180 providing that the court shall call upon the accused to enter his defence if it finds at the close of the prosecution case that a "*prima facie* case has been made out against the accused", whereas prior to the amendment Act 1996 it was that the accused would be called to enter his defence only after the court had subjected the prosecution evidence to a maximum evaluation (*Khoo Hi Chiang v. PP* [1994] 2 CLJ 151) and only if the prosecution had made out a case on a beyond reasonable doubt standard of proof against the accused (*Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1), is a watershed on the definition of "the case against the accused at the close of the prosecution case". Under the present provisions, when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case; the expression "*prima facie* case", in the context of s. 180, is used not for brevity to denote the case at the stage of the prosecution case but a case forged on *prima facie* evidence. And because both accused are not jointly charged with committing the same offence in furtherance of a common intention under s. 34 of the Penal Code (FMS Cap 45), the prosecution must establish the case, as aforesaid, against each accused as a separate exercise (see *PP v. Mohd Nasir bin Shahabuddin* [1994] 2 MLJ 576).

However, the present provisions, though in force at the commencement of the trial, do not govern the instant trial.

In *Bahruni b. Ismail v. PP* [1997] 3 CLJ 267, an authority surely binding on this court, the Federal Court held that the Amendment Act has no retrospective effect and would be applicable to cases filed after and not before 31 January 1997. Speaking for the Federal Court, Shaik Daud JCA pronounced, "in all cases before 31 January 1997 the beyond a reasonable doubt standard of proof must of necessity apply as there can be only one interpretation of s. 180 CPC, all along, and that is decided by the majority decision in Arulpragasan".

In the instant case, both accused were arraigned even before the Amendment Act was tabled let alone in force, the case was forwarded to the High Court for trial in November 1996, and the prosecution and defence were informed of the impending trial on 9 January 1997. Obviously, this is a case with the features of a case "filed" before 31 January 1997, and the provisions that govern the instant trial are those in the pre-amendment Act Chapter XX of the CPC. It means, this is a case where the prosecution is required, so the accused would be called upon to enter his/hers/their defence, to make out a case against the accused on a beyond reasonable standard of proof, failing which the accused would be acquitted.

The prosecution evidence may be summarised as follows. At 2.30pm on 23 November 1995, Chief Inspector Kooi Chun Chai (PW3) from the Georgetown Serious Crimes Division was directed to head a police party and arrest one Quah Seng Hooi. PW3 assembled the arrest party, consisting of Detective Corporals Narayanan a/l Narayanan Nair (PW4), Chan Boon Kong (PW6), Mohamed Anuar bin Cheenee Md (PW5) and Anan a/l Veloo). He instructed PW5 to observe a double storey house known as 1-T Lorong Delima 9, Island Glades, Georgetown (hereinafter referred to as "the said house"). PW5 departed to observe the said house, whilst PW3 and the rest remained at the police station. Just past 3pm, PW5 arrived at the said house. Parked in the house compound were a car – PAQ 9030, and a motor-cycle – PCW 4783. Sometime after 4pm, a male of Chinese descent came out from the said house. He rode off on PCW 4783 towards the direction of Lorong Delima 8. He passed PW5. PW5 telephoned PW3 (according to PW3, it was at 4.55pm) and informed PW3 that a man of Chinese descent had come out from the said house and had ridden away on a motorcycle – PCW 4783. PW3 instructed PW5 to wait at the junction of Lorong Delima 9 and to "ambush" that man when he returns. PW3 and the rest of the arrest party proceeded to the said house. They arrived at 5.20pm and took their assigned positions in the vicinity of the said house.

At 6 pm, a motorcyclist was entering Lorong Delima 9. Behind that motorcyclist was PW5 on his motorcycle. PW3 believed that Quah Seng Hooi had returned. PW3 rode to the said house on his motorcycle just as PW6 was coming out from his hiding place. PW6 apprehended the motorcyclist at the front gate of the said house. The motorcyclist was handcuffed and searched. PW6 removed a bunch of keys (P15) from the motorcyclist's trouser pocket. That motorcyclist was Quah Seng Hooi, the 1st accused. With the keys recovered from the 1st accused, PW6 attempted to open the front iron grill door of the said house. That grill door was locked but the front wooden doors were ajar. PW6 failed to open the front grill door. PW3 attempted then to open the front grill door. PW3 noticed a woman (later identified as the 2nd accused) carrying a baby of a few months – Quah Loo Ee – in the guest hall. PW3 identified himself in the Hokkien dialect, *"saya memperkenalkan diri sebagai polis dan menyuruh OKT2 membuka pintu grill"*, and requested the 2nd accused to open the front grill door. The 2nd accused walked towards the grill door. Just then, the 1st accused, who was under guard near the front gate, shouted out in a foreign tongue. PW3 said he did not know the language. The 2nd accused turned away from the front grill door, put the baby she was carrying on a sofa in the guest hall and entered the back room (back room) on the ground floor; the door to the back room was closed but not locked. Thereafter, thick smoke emitted from the back room. The 2nd accused came

out from the back room, closed the door and carried the baby. By then, *dalam 2 – 3 minute saya dapat masuk kedalam rumah* PW3 had opened the padlock on the front grill door. Both PW3 and PW6 rushed inside the house and immediately climbed the stairs to the top floor. There was no one on the top floor. From the top floor, PW3 instructed PW4, then at the back of the said house, to enter the house and help put out a fire. PW3 and PW6 descended to the ground floor. There was a fire in a half cylindrical iron drum (P6(3)) in the back room. PW3, PW4 and PW6 doused the fire, within 5 to 10 minutes, with water from the adjoining bathroom. The wall beside the half drum was scorched. In the back room, according to PW3, were two sacks containing a white substance, bottles containing liquid, weighing scales and a plastic strainer. PW3 informed his superior officer of the arrest of Quah Seng Hooi and the things in the said house. PW3 was told that an officer from the Anti Narcotics Division would be arriving soon at the scene. PW3 instructed his men not to disturb the things in the back room. Meanwhile, the 1st accused, who was still outside, was escorted into the said house; the 2nd accused was in the guest hall. There, PW3 searched the 1st accused; on the 1st accused were found RM1,000 in RM50 notes (P12), one handphone (P24), one pager (P13), a motorcycle key (P14) and a purse with a driving licence (P17) in the name of the 1st accused. In the house, was a set of car keys (P19). A car, PAQ 9030 (P22), was parked in the porch. A motorcycle, PCW 4783 (P23), was in the compound of the house.

At 7.05pm ASP Wan Abdul Rashid (PW11) from the Anti Narcotics Division arrived at the scene. PW11 testified that there was smoke in the said house when he arrived. PW3 briefed PW11 on the arrest and the things in the said house. After that briefing, PW11 and PW3 entered the back room at 7.20pm. In the presence of the 1st accused, PW11 searched the back room. There were two halves of an iron drum on the floor. The half drum (P6(3)) closer the door was filled with the water that doused the fire. Submerged in the blackish and oily water in that half drum were (i) seven compressed blocks of a white substance (P6(5s), P6(7s), P6(9s), P6(11s), P6(13s), P6(15s) P6(17s)) each wrapped with a plastic covering, (ii) a large plastic bag containing an orange substance (P6(18s)), (iii) a dark canvass bag (P6(22)) covered with a white and orange substance, (iv) three firebricks (P6(23-25)), and, (v) a large quantity of an orange substance at the bottom of the drum. The other half drum was empty. Also in that back room, so PW11 testified, were two sacks of caffeine (P7(4s) & P7(5s)), a large bottle of chloroform (P7(6)), a plastic bag containing five bottles of acid (P7(11A – 11E)), three empty bottles (P7(12A – 12C)), two bottles of ENO salt, 2 weighing scales (P7(15A & 15B)), a plastic film sealer (P32(26)), a hammer (P32(22)), a bottle of petrol, a plastic rack containing a blue plastic and in it two newspaper packages containing seven

packages, a black plastic bag containing six bottles of a colouring substance, a white plastic bag containing three tins of colouring substance, a plastic sieve with traces of caffeine, a black plastic bag containing chloroquine, a large quantity of plastic bags of assorted sizes and a lighter. Below a sink outside the back room were basins, pots, and an extension coil. In the guest hall was a waste paper basket with newspapers (P7(18A & 18B)) bearing traces of heroin.

At 9pm, PW3 began his search in the presence of the 1st accused of the rooms on the top floor. In one of the front rooms, were a mattress and male, female and baby clothing. In that room in a cupboard, PW3 recovered a red pouch containing some gold ornaments. Both the front rooms had a door to the front balcony. In the back room on the top floor, was a mattress. However, there was no mattress in the other front room. PW3 testified that he departed from the said house at 11pm. At his office, PW3 prepared a search list (P30) and served a copy on the 1st accused. PW11 prepared his search list (P26) and served a copy on the 1st accused. At the police station, both accused had their hands swabbed and their finger nails clipped. Those hand swabs and finger nails were forwarded, as were other drug related exhibits, to a government chemist (PW2) for his analysis. And it was the testimony of PW2 who analysed the drug related exhibits that (i) the seven blocks of a white substance, a large plastic bag containing an orange substance, a dark canvass bag covered with a white and orange substance and the white substance at the bottom of the drum (exhibits recovered from the same half drum) contained a total of 1,720.1 grams of heroin, (ii) the three bricks and newspapers had traces of heroin, and, (iii) the hand swabs and nail clippings were free of dangerous drugs.

All that evidence, as summarised, is not in dispute, save it was proposed and or suggested by Mr. Kitson Foong, for the 1st accused, as he was examining the prosecution witnesses, but denied by all, (i) that the keys to the said house were not recovered from the 1st accused, (ii) that the arresting party gained entry into the said house by forcibly opening the balcony door, and, (iii) that one Quah Seng Lee was also an occupier of the said house. Yet, it could not and was not denied, and it is the finding of the court from the undisputed evidence on (i) the total weight of heroin substances, (ii) the use of chloroform, acid, caffeine, chloroquine and colouring substances in the process to "cut heroin", that is, to dilute the concentration of heroin in a substance, and, (iii) the seven compressed blocks, relatively speaking, had a much higher concentration of heroin than the orange substances at the bottom of the drum as would evince that heroin was indeed cut in the back room, that there was a drug trafficking activity in the back room. The sum total of the exhibits recovered from the back room and the explanation of the chemist on the use

of the non-heroin material were direct evidence of trafficking within the meaning of s. 2 of the Dangerous Drugs Act 1952.

It is the finding of the court, as well, that Quah Seng Lee, the person named by learned defence counsel, was not occupying or using the said house at the material time. Reasonably, if Quah Seng Lee or some other person was occupying or using the said house, there would have been a stamp or some imprint, would it not, of such occupation/use. Yet, the said house, and it was thoroughly searched, had not a sign or trace of a third party's occupation/use. Both learned counsel conceded, at the stage of submission at the close of the prosecution case, that both accused were occupants of the said house. That being the case, then the only occupants of the said house were the accused – the state of the said house reflected that one room was inhabited while the others were not – and their infant son, Quah Loo Ee – his birth certificate (P27) has both accused as his parents.

Some undisputed facts stand out more than the others. At about 4.55pm, the 1st accused departed from the said house. He returned at 6pm and promptly was arrested at the front gate outside the said house. At 6.05pm, when the 1st accused was allegedly committing the crime, he was already under arrest. The heroin exhibits and the material "to cut" heroin were all in the back room of the said house. At about 6.05pm, the 2nd accused was cradling her baby at the guest hall. PW3 identified himself as a police officer and requested the 2nd accused to open the front grill door. The 2nd accused walked towards the front grill door. The 1st accused shouted out in a foreign language, and whereupon, the 2nd accused turned away from the front gate, left the child on a sofa and entered the back room. She came out from the back room. Thereafter, smoke emitted from the back room. Heroin was not detected underneath the finger nails or on the hands of both accused.

Therefore, neither accused, at 6.05pm, was in the immediate vicinity of the exhibits in the back room. It is true, but of course, that one may yet be in possession without the physical possession. After all, physical proximity or actual physical possession, or the lack of it, cannot be considered in isolation, as the surrounding circumstances, in as much as it may refute possession by one even in close proximity or in actual physical contact, may also affirm possession by one even from a distance.

"Possession" is not an easy word to define. According to Taylor J, in *Leow Nghee Lim v. Regina* [1956] MLJ 28 at 30, it is one of the most difficult of English words. Nonetheless, judicial pronouncements as to its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Lok and Mak Tin v. Rex* [1949] MLJ 54; H*o Seng*

Seng v. Rex [1951] MLJ 225; *Leow Nghee Lim v. Reg* [1956] MLJ 28; *Director of Prosecutions v. Brooks* [1974] AC 862; *PP v. Lai Ah Bee (supra); Badrulsham bin Baharom* [1988] 2 MLJ 585) but "a man has not possession of that of the existence of which he is unaware" (per Cave J in *R v. Ashwell* [1885] 16 QBD 190 at 201). Mere knowledge however is not sufficient to establish possession (see *Gooi Loo Seng v. PP* [1993] AMR 27-11335), but the power of disposal (see *PP v. Ang Boo Foo* [1981] 1 MLJ 40) is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see *PP v. Kau Joo Huat* [1988] 2 MLJ 91).

In *Leow Nghee Lim v. Reg (supra)* Taylor J explained the meaning of custody "as having care or guardianship ... knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession", while Ambrose J in *Neo Koon Cheo v. Reg* [1959] MLJ 47 explained that "custody is actual physical control and control must be construed to mean any form of control other than actual physical control".

Towards proof of one or more of the ingredients of an offence under the Dangerous Drugs Act 1952, s. 37 provides a number of presumptions. On the presumption under s. 37(d) of the DDA, the Supreme Court, per Anuar J, (as he then was), in *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791 at 1798 enunciated as follows:

> it was accordingly held that there was no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Unless this can be proved the presumption under s. 37(da) of the Act that the appellants were trafficking in drugs did not arise.

However, the principle that there must foremost be the basic/primary facts or a pre-existent presumption for a particular presumption or further presumption to materialise applies generally to all s. 37 presumptions.

And it is settled, that an accused, as opposed only to the general evidential burden on him to cast a reasonable doubt on the prosecution case, would have to rebut a statutory presumption, whenever it is invoked upon proof of primary facts, on a balance of probabilities (*Yuvaraj v. PP* [1969] 2 MLJ 217). But even then, if an accused fails to rebut any presumption, the court, if left in a state of doubt whether the accused had committed the offence as alleged, must yet acquit an accused.

It was the learned DPP's claim, during submission at the close of the prosecution case, that the prosecution has proved the primary facts for the invocation of the presumption under ss. 37(b) of the DDA. On that claim, the

learned DPP was spot on, as learned defence counsel had conceded that the accused were occupants of the said house and the court finds as well that both accused were the only adult occupants of the said house. It means, invoking the presumption under s. 37(b), that both accused are deemed until the contrary is proved to be occupiers of the said house. However, with respect to his submission that each accused had custody and or control of the dangerous drugs and other exhibits in the back room, the learned DPP was not supported by any direct evidence.

It was not the prosecution evidence that both accused were in actual physical possession of the incriminating exhibits. The 2nd accused was some distance from the back room whilst the accused was outside the said house he was away from for no less than one full hour. It was the prosecution evidence as well that the back room was not locked. Then it was possible, during that one hour, no less, that the 1st accused was away, that the 2nd accused could have entered the back room. It was also possible that a third party could have entered the said house and back room between 4pm to 5.20pm, as the rear of the said house was not observed at all until after the arrival of the arrest party. That drugs were found in the back room is not in doubt. But it could not be inferred, by reason of the discovery of drugs in the back room at the time of the raid, that drugs were already in the back room when the 1st accused departed from the house at 4pm. The drugs might well have been deposited without the 1st accused's knowledge after he had left the said house but before the arrival of the arrest party.

With regard to the case against the 1st accused, and it is worth recalling that "the onus not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility" (see *Abdullah Zawawi bin Yusoff* [1993] 3 MLJ 1 per Edgar Joseph Jr SCJ at 7), that possibility of access to the back room by the 2nd accused or by others was not excluded by the prosecution.

There are a number of decisions (*Gooi Loo Seng v. PP* [1993] 2 MLJ 137; *Lee Chee Meng v. PP* [1992] 1 CLJ 345; *Abdullah Zawawi bin Yusoff (supra)*) illuminative of the Supreme Court's reception of an accused's defence of access by others and loss of exclusive possession of premises in which drugs were found. However, the case made out against the 1st accused, in that he was outside the house where drugs were found, bears similarity to the two following cases.

In *PP v. Tan Ah Ling* [1990] 2 CLJ 83, a police party stopped a car driven by the accused and brought him to his house. The accused's wife was in the house. The police searched the house in the presence of the accused and his

wife. In the kitchen, were slabs of raw opium. It was held that the essential element to be established against the accused was his possession of the raw opium found in the house; however at the time of recovery the accused's wife was the only adult in physical possession of the premises and was the only person who appeared at the material time to have the custody and control of the raw opium.

In *PP v. Bacho bin Samsudin* [1994] 1 CLJ 143, the accused was stopped by police at a road junction near his home and taken to his room where five envelopes containing cannabis were found. The accused shared the house with several family members who had access to the accused's room although the room was sometimes locked by the accused. The trial court held that the accused did not have exclusive use of the room and in the absence of any evidence of the accused's finger prints on the envelopes and the period of time the room remained locked, it could not be inferred that the accused had custody or control of the incriminating envelopes.

In the instant case, there was a total absence of any direct evidence that could connect the 1st accused to the drugs in the backroom. All there was, was his occupation of the said house and his access, since he was an occupier of the house, to the back room. Otherwise, nothing more incriminating than a set of house keys was found on him. Drugs were not detected on his hands. The key to the back room, discounting the fact that the door was not locked, was not with him. His fingerprints were not found, since proof to the contrary was not adduced, on any of the exhibits. There was evidence that he shouted in a foreign language, and that the 2nd accused, probably hearing his shouts, turned away from the front door and proceeded to the back room. But what the 1st accused shouted is a matter of conjecture, and is not irresistible proof of his guilty knowledge or of his custody or control.

The case might have been stronger if the 1st accused had the key to the backroom, if his fingerprints were found on the exhibits, and if the drugs were concealed in the said house to have given rise to the 37(g) presumption that the said drugs were so concealed with the knowledge of the 1st accused. But as it stands, the case against the 1st accused was built on suspicion, and suspicion alone, however grave, is not cogent nor compelling evidence that the 1st accused had custody and control of the drugs to attract the presumption under 37(d). At best there was circumstantial evidence, but with gaps that did not point irresistibly to the 1st accused's guilt (*Chang Kim Siong v. PP* [1968] 1 MLJ 36; *Jayaraman v. PP* [1982] 2 MLJ 306; see also *PP v. Lin Lian Chen* [1992] 1 CLJ 2086).

The only adult in apparent possession of the house was the 2nd accused who alone appeared to have custody and control of the drugs at the material time, that is at 6.05pm. And she alone set alight the drugs in the half cylindrical drum as the arresting party were attempting entry into the said house. But that was all that was going for the prosecution. There was no evidence that the 2nd accused knew the nature of the contents she set aflame in the half drum. The chemist detected the presence of heroin on the floor of the back room. Most probably, that heroin dropped onto the floor as drug exhibits were being handled. Then, the 2nd accused's hands, if she had handled the seven blocks and canvass bag and had it placed into the drum as the arrest party were at the door, should be coated with heroin substances. Yet, her hands and finger nails, bearing in mind she was under constant guard from about the moment she left the back room and she had no opportunity to wash her hands, were free of heroin substances. Proof was not adduced that her finger prints were found on any of the seven blocks, canvass bag, bottle of petrol or lighter. It was more probable that the drugs were already inside the drum when the arrest party were at the door. To take the prosecution case from the beginning, she was not the arrest party's "target". At 6.05pm, she was nursing her infant child. PW3 identified himself to the 2nd accused, "*saya memperkenalkan diri sebagai polis dan menyuruh OKT2 membuka pintu grill*", and requested her to open the front grill door. And the 2nd accused walked towards the front grill door. Her conduct, up to that point, was consistent with innocence, as she would not, would she, have walked towards the front door, and from the tenor of the evidence she was responding positively to PW3's request to her to open the door, if she had knowledge before hand of the drugs in the back room whilst the police were at her door. It was only after the 1st accused's shouts that she turned away from the front door, entered the back room and set the contents in the drum aflame. Given that set of facts, and "where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case ... the inference most favourable to the accused should be adopted" (see *Tai Chai Keh v. PP* [1948-1949] MLJ Supp. 105 at 108), the 1st accused might well have been shouting frantically to the 2nd accused not to open the door and to set alight the contents in the drum, to save his own skin, whilst the 2nd accused, being the 1st accused's wife, might well have been carrying out her husband's bidding without any adequate knowledge of the nature of the contents in the drum.

Yes, the fact that the 2nd accused set the contents in the drum alight, is not in her favour. Yet, her conduct, on balance, was not inconsistent with innocence. The evidence was not inconsistent with her role as a mere bystander. Even the arrest party perceived it so, as they saw it fit, and they were at the scene, to dispense with the 2nd accused's presence as they searched

the said house and back room and to dispense with the service of the search lists on her. Since the 2nd accused was not present when the said house and back room were searched and was not served the search lists, and since the prosecution must establish the case against her as a separate exercise, the evidence of the search and the recovery of the exhibits from the backroom, though not inadmissible against her, must yet be regarded as evidence she would not be able to rebut or to have her own version, since she was not present, and as evidence therefore unfairly laid out against her. It is only just and it is only fair, could it be any other way in a case involving a capital offence, that the prosecution cannot gain from its own lapse in the conduct of the investigation, and that the 2nd accused, absent during the search and not served the search lists, need not respond to the evidence on the search and recovery of exhibits against her.

Undoubtedly, there was a drug trafficking activity, trafficking because of the weight of heroin, in the back room. At the very least, one of the accused was carrying out that trafficking activity. Since the evidence against the 2nd accused was not consistent with the guilt of the 2nd accused, it would appear therefore that the 1st accused, the only other adult occupier, was the guilty party. But that would be a deduction of the guilty party by a process of elimination rather than by a process of proof beyond reasonable doubt.

In a situation of a doubt as to which accused is guilty the course adopted is summarised in the oft quoted words of Lord Goddard in *R v. Abbott* [1955] 2 All ER 899:

> if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove its case ...

Those words were cited with approval in *Shamsuddin bin Hassan & Anor v. PP (supra)*, where the Supreme Court, in a textbook situation as to which one of two occupants in a car had thrown out a bundle containing drugs, and in the absence of evidence of common intention, allowed both appellants' appeal against their conviction.

This is a trial of an offence involving capital punishment and evidence by inference alone is not enough to support a conviction without the element of control (see *Choo Chang Teik v. PP* [1991] 3 CLJ 2387). The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else (see *Sia Soon Suan v. PP* [1966] 1 MLJ 116).

The court finds, at the close of the prosecution case, that the prosecution has failed to make out a case beyond reasonable doubt; both accused are therefore acquitted and discharged.

Reported by Bernadette Soosai

This page is intentionally left blank